IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 72 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JAGANNATHJI MANDIR TRUST

Versus

UNION OF INDIA

Appearance:

MR MIHIR THAKORE with MR GM JOSHI for Appellant

NOTICE NOT RECEIVED BACK for Respondent No.1.

MR MANISH R BHATT for Res.No.2

(MR BB NAYAK with M.R. BHATT for Res. No. 2 in CA No. 1881/2001)

MR. MAYANK VORA for Respondent No.3

MR. ND NANAVATI with MR IM BANGALI for Res. No. 4

CORAM : MR.JUSTICE J.R.VORA

Date of decision: /08/2001

C.A.V.JUDGEMENT

1. This Appeal From Order is preferred by original

plaintiff, being aggrieved and dissatisfied by an order passed by the City Civil Court, Court No.10, on 19th December, 2000, below Notice of Motion in Civil Suit No. 4777 of 2000 by which the learned Chamber Judge, City Civil Court, was pleased to reject the Notice of Motion for the interim relief filed by the plaintiff.

2. Brief facts of the case are that present appellant - plaintiff herein is a religious Trust and owner of suit property entered into the contract of lease with respondent No3 herein - original defendant No.3 vide registered deed dated 24.1.1961 for 99 years. There were number of terms and conditions in the above said lease deed. The defendant No.3 - respondent No.3 herein was not restricted by contractual terms to transfer his lease hold rights upon any third party. The plaintiff trust is the Jagannath Mandir Trust and one of the terms of the lease was that respondent No.3 or his assignee would not do any act which would adversely affect the religious feeling of the Hindu Community because in the rest of the land of the suit property there situated is a temple of God Hanumanji. Thereafter respondent No.3 herein lessee entered into an agreement with a third party to assign his leasehold rights in respect of suit property for the aggregate sum of Rs. 30,00,000/-. Law of Income Tax requires that such transaction would attract the provisions of Income Tax Act and the Union of India and Income Tax Department are respondents No. 1 and 2 herein i.e. Union of India and Chief Commissioner of Income Tax. Under Section 269 of the Income Tax Act, the Income Tax Department found that the transaction was improper and not realistic between respondent No.3 and third party and hence purchased the suit property from respondent No.3 lessee. Thereafter, the Income Tax Department as per provisions of Sec. 269 by public auction sold the suit property to respondent No.4. herein who is the original defendant No.4 in the suit. The consideration was fixed at Rs. 85,00,756/-. The Income Tax Department received the full consideration and the possession of the suit land was handed over to defendant No.4 i.e. respondent No.4 herein on 24.2.2000. The deed of conveyance in respect of this transaction between the Income Tax Department and respondent No.4 herein is yet to take place. On this strength, respondent No.4 intended to construct residential premises on the suit land and necessary brochures were got published by respondent No.4 herein. It is the case of the plaintiff further that from the brochures it is apparently clear that residential scheme is floated essentially for the members belonging to Muslim community. Therefore, it is

apprehended by the appellant/plaintiff that if the Muslim community will occupy the residential quarters to be constructed by respondent No.4 on the suit property, then in all probabilities and possibilities, such residents shall cook non-vegetarian food in the residential premises which would attract the terms and conditions of original lease deed dated 24.1.61 because the same would hurt the religious feeling of the plaintiff and Hindu Community at large and, therefore the suit is filed for declaring the transaction between the Income Tax Department and the respondent No.4 herein to be null and void and not binding to the plaintiff. A decree is also prayed, for the vacant and peaceful possession of the suit land in favour of the plaintiff against all the defendants and declaratory decree is also sought for to the extent that putting up housing scheme by respondent No.4 on the suit land as unauthorised and against the terms of the lease and illegal and for the decree of permanent injunction against respondent No.4 restraining him from doing any further activity of construction of any nature on the suit property and from transferring the suit land to any third party in any manner whatsoever or to create charge over the suit property or to make any activity which will diminish the value of suit land. A decree for the payment of the rent is also sought for. The plaintiff appellant also filed a Notice of Motion in the above said suit and asked for following three reliefs :

(a) The Hon. Court be pleased to grant temporary injunction against defendant no. (4) from doing any further activity of construction of any nature on the suit property - suit land and from transferring the suit land to anybody in any manner whatsoever or create charge over the suit property or to make any activity over the suit property which will diminish the value of the same.

(b) The Commissioner may please be appointed to make complete report of the position and construction work (if any) over the suit property.

(c) the costs of this application be awarded to the plaintiff from defendant no. (4) and any other appropriate remedy be awarded to the plaintiff.

3. the defendants - respondents No. 1 and 2 took the defense under Section 293 of the Income Tax Act that the suit was barred and, therefore, the Notice of Motion was incapable of being allowed in the light of statutory

bar contained in Section 293 of the Income Tax Act because the acquisition of the property by Income Tax Department was under Section 269-UD which would attract Section 293 of the Income Tax Act, inter alia, respondent No.4 also contended that under the Gujarat (Prohibition of Transfer of Immovable Property and Provisions for Protection of Tenants from Eviction from Premises and Disturbed Areas Act, 1991 the power to grant interim relief under Section 4 of the said Act are to be exercised by the Deputy Collector, Ahmedabad and not by the Civil Court. The matter, according to respondent No.4 is pending with authority. A dispute also was raised that the suit property was covered under the provision of the Bombay Rent Act. It is also contended that the apprehension of the plaintiff that there would be a violation of covenant contained in the lease document dated 26.1.1961 with regard to cooking/bringing of non-vegetarian food is also unfounded without any base because the apprehension is premature for that no order or injunction can be passed in favour of the plaintiff. It was also contended that there were 17 families belong to Muslim Community residing in the suit land. It was also contended that respondent No.4 paid a huge consideration to the Income Tax Department and is a bona fide purchaser. In response to the public notice issued by the Department, and after auction purchase he has been legally and validly put into possession of the suit property and he cannot be stopped from making construction. On behalf of respondents No. 1 and 2 a stand was also taken that the auction was carried out in the year 1994 and thereafter for six years the Income Tax Department paid the annual lease rent to the plaintiff trust who has accepted the same without any demur or objections and the acquisition cannot be challenged after six years.

4. Learned City Civil Judge after hearing both the parties came to the conclusion that respondent No.4 in response to public notice and for huge consideration was put in possession of the suit property. At that time, the plaintiff trust did not raise any objection nor alleged any mala fide against respondents No. 1 and 2 in the pleadings. The learned Judge also considered that the City Deputy Collector has issued order of injunction restraining the defendant No.4 from carrying out the construction upon the suit property. The said order is dated 26th July, 2000. The learned City Civil Judge also considered that the City Civil Court cannot sit in appeal over the said order nor can decide the vires of the said order. The City Civil Court further observed that on the above facts, the notice of motion is required to be

rejected. About prima facie case of the plaintiff, the City Civil Court observed that the plaintiff failed to establish prima facie case in his favour or the balance of convenience and the plaintiff has woken up after six years to challenge the act of acquisition by the Income Tax Department, which would go against the plaintiff. In the opinion of the City Civil Judge, the contention of the plaintiff that the whole property is sold to respondent No.4 is not correct. According to learned City Civil Judge all that the leasehold rights were transferred by the Income Tax Department to defendant No.4 herein. Therefore, in the opinion of the City Civil Judge, the defendant No.3 could not be prevented from exercising his right conferred upon him by the lease as well as by the transaction between him and the Income Tax Department. The apprehension on the part of plaintiff in the opinion of the City Civil Judge was without any corroborative evidence or factual basis of support and for these reasons the City Civil Court rejected the Notice of Motion of the plaintiff, but, however, while rejecting the Notice of Motion, the City Civil Court put some conditions on respondent No.4 for the unwary purchaser to the extent that before inducting any person or persons or creating any right in favour of such person, the respondent No.4 is directed by the City Civil Court to obtain all the necessary permission from all relevant authorities. A liberty is also reserved by City Civil Court for respondent No.4 to apply to the City Civil Court seeking any relief in such circumstances with regard to the disputed property.

5. Being aggrieved by the above said order, original plaintiff has preferred this Appeal.

6. Heard learned Sr. Counsel Mr. Mihir Thakore for the appellant, learned Advocate Mr. B.B.Nayak for Respondent No.2 and learned Sr. Counsel Mr. Nanavati for respondent No.4.

7. Learned Advocate Mr. Mihir Thakore has drawn the attention of this Court on the relief claimed. It is stated that in the relief claimed against respondents No. 1 and 2 in original suit, the relief in Para 14(c) of the plaint is claimed against respondent No.4 for making housing society as proposed by him. It is urged that the maintainability of the suit can be decided in the suit only and not at the interim stage. In the Notice of Motion it is contended that the relief is claimed against only respondent No.4 and not against any of the other defendants. It is contended that in any case the suit is maintainable as against defendant No.4 - respondent No.4

herein under the scope of lease deed itself. Attention of the court is also drawn to the concerned terms and conditions of the said lease deed. It is contended that the original lessee cannot confer any extra right than what is stated in the lease deed. It is also stated that the lease deed referred to above is a registered one and it could be said that the registration is notice of covenant in the lease deed. Property though purchased by the Income Tax Department u/s 269 UD, but what is acquired by the Income Tax Department is a leasehold rights only and it cannot confer more than that to respondent No.4. Attention of the Court is also drawn to Sec. 40 of the Transfer of Property Act. It is contended that Sec. 40 of the Transfer of Property Act empowers a third party i.e. appellant, herein, to the extent that for beneficial enjoyment of his property, to restrain others in the enjoyment of the property of others. In terms it is contended that for the beneficial enjoyment of its property i.e. temple of Hanumanji, lessee and assignees are restrained from doing any act which would hurt the feeling of Hindu community and the same is exemplified by a covenant that non-vegetarian food will not be brought on the property. It is urged that this is a negative covenant recognised by Sec. 40 of the Transfer of Property Act can be enforced against others restricting their enjoyment of their property. It is urged that this covenant can be enforced u/s 40 of the Transfer of Property Act not only against the original lessee but against his assignees also because whoever purchases the leasehold rights are bound by all the covenants in the lease deed which is a registered one and public have notice of it.

8. It is also vehemently contended by Mr.Thakore that rejection of plaint under O. 7 R.11 of the C.P.C. because of bar u/s 293 of the Income Tax Act as urged by the other side may not have any relevance so far as the interim relief which is asked for against respondent No.4 is concerned. The cause of action, according to Mr. Thakore, is against respondent No.4 also and the suit can still survive against respondent No.4 because the suit is also filed for the enforcement of negative covenant contained in lease deed that the lessees and assignees of the lessees are forbidden to do any act which would hurt the feeling of Hindu Community like bringing non-vegetarian food on the suit land. Learned Advocate Mr. Thakore further urged that when the present respondent No.4 is bound by the negative covenant, plaintiff - appellant has every right to obtain interim relief in his favour for restraining the breach of the above said negative conditions and to enforce the same.

It is submitted that the trial court committed error in stating that there was no factual basis or apprehension to come to the conclusion that the negative covenant is not to be enforced and the apprehension of the plaintiff is not well based. It is submitted by learned counsel Mr. Thakore that in written statement filed by respondent No.4, he has admitted that he is going to float the residential scheme on the suit land. It is also submitted that the relevant authorities who approve necessary permission have been moved by the defendant No.4 for the approval of the construction. Learned Advocate Mr. Thakore further submitted that the area in which this land is situated is heavily populated by the Muslim community. It is submitted that in all probabilities and possibilities if construction is allowed and residential quarters are erected and allotted, there will be breach of condition that the non-vegetarian food is not to be cooked or brought on suit land hurting the feeling of the Hindu community. Learned Advocate Mr. Thakore submitted that these are the factors for the apprehension of the plaintiff that the very important covenant in the lease deed, as aforesaid, will be breached. From the above it is clear that the apprehension of the plaintiff appellant is very well founded. The appellant plaintiff according to Mr. Thakore, cannot be asked to wait and watch till the respondent No.4 erects the structure, till the residents cook the non-vegetarian food, so as to breach the important condition contained in the lease deed. Learned advocate Mr.Thakore further contended that when there are admitted facts stated above to substantiate the apprehension of the plaintiff, the plaintiff is entitled to file the Notice of Motion as it is filed and is entitled to obtain the relief of temporary injunction as prayed for. However, the learned Trial Judge has failed to consider this very important aspect of the matter. The parties, according to Mr. Thakore, are required to take timely action in such matters. Here in this case respondent No.4 is required to be restrained from construction when there is no construction on the suit land and if the construction is made, the right of the plaintiff will be lost and it would be difficult and impossible to enforce to legitimate negative covenant between the parties. By virtue of condition on the lease deed, respondent No.4 is bound not to cook/or bring the non-vegetarian food on the suit land as to hurt the feeling of the Hindu community. According to Mr. Thakore, this can be done at this juncture only and that too by restraining the respondent No.4 from making any residential construction which would result in breach of the negative covenant.

9. Respondent No.4 may, according to Mr. Thakore, construct any business or a commercial premises, there cannot be any objection to them, but he must be prevented from constructing a residential premises. In support, learned Advocate Mr.Thakore has drawn the attention of this Court to HALSBURY'S LAWS OF ENGLAND, Vol. 24 in paras 831 and 832 on page 435, which is under :

"831 Negative and affirmative covenants and stipulations : In the case of a negative covenant or stipulation the court will usually enforce compliance by injunction without regard to the question of convenience or the amount of damage caused. Where a covenant is affirmative and of a kind which the court will enforce by a decree for specific performance, that is normally the appropriate remedy. The court will, therefore, refuse an injunction unless the affirmative covenant is in substance negative or forms part of an indivisible contract containing another covenant which is negative.

832. Threatened invasion of legal right. Where a plaintiff has established that he has a right which has been infringed and that further infringement is threatened to a material extent, he is entitled to an injunction to restrain the threatened infringement upon the ordinary principles upon which the court acts in granting injunctions. If the plaintiff's right to relief rests mainly on damage which has not been actually suffered but is likely to accrue within a reasonable time, the court will take that into consideration and grant an injunction. Therefore, although the plaintiff's legal right is not disputed, an injunction may be granted to restrain the commission of an apprehended or threatened act, on the ground that if the act is done it will violate the plaintiff's legal right, if he can show strong probability that the apprehended mischief will in fact arise. However, no one can obtain a quia time order by merely saying `timeo'. He must aver and prove that what is going on is calculated to infringe his rights. The mere fact that the defendant denies any intention of committing the act complained of is not a itself a sufficient ground for refusing relief, but it is not sufficient ground for granting an injunction that, if there is no such intention, the injunction will do the

defendant no harm. An injunction will not be granted if the defendant, even though he asserts his right to do the act, not only says that he has no present intention of doing it but undertakes to give reasonable and sufficient notice before attempting to do it. An injunction may also be refused where, on the defendant being served with the writ, the plaintiff is offered and may obtain all the relief that he seeks, and the offer is one which he ought to have accepted. The court will not restrain future acts of a wrongdoer unless it is plain that they will be of a wrongful nature. Where there seems to be no probability that the act complained of will be repeated, the court will sometimes make a declaration only, with liberty to apply for an injunction if necessary.

However, if the defendant claims and insists his right or gives distinct notice of his intention or threatens or intends to commit an act which, if committed, would, in the court's opinion, violate the plaintiff's right, an injunction will be granted."

10. Learned Counsel Mr. Thakore has also drawn the attention of this Court to Para 904 and 906 of HALSBURY'S LAWS OF ENGLAND, of the same volume which are under :

904. Proof of damage unnecessary. Where parties to an agreement contract, with their eyes open, that a particular thing is not to be done, proof of damage is generally not necessary in order to entitle the plaintiff to a perpetual injunction to restrain a breach. The principle applies not only to a breach by the original covenantor, but also to a breach by an assignee with notice of the covenant, but in cases where there is no privity of contract the court is probably bound to exercise its judicial discretion with regard to granting an injunction. If the construction of the contract is clear and the breach is clear, the mere circumstance of the breach affords sufficient ground for the injunction. In such a case the court has no discretion to exercise. All that it has to do is to say by way of injunction that the thing must not be done. The injunction does nothing more than give the sanction of the process of the court to that which is already the contract between the parties. In effect it is the specific

performance by the court of that negative bargain which the parties made with their eyes open.

906. Covenants in leases : In a proper case the court will restrain the breach of covenants in leases, such as covenants not to carry on any business, trade or calling. The circumstance that a lessor has a right of entry for breach of covenant does not preclude him from applying for an injunction to restrain commission of the breach. In order that a reversioner may obtain an injunction to restrain the breach of restrictive covenants affecting the estate, he must bring his case within the legal principles applicable to damages and show that damage will be done to the reversion.

11. Learned Counsel Mr. Thakore relying upon the above Paras of Halsbury's Laws of England, contends that this principle is said as Quia timet action, the court can in such action grant injunction. Learned Advocate Mr. Thakore has relied upon the decision of the Supreme Court in the matter of KULDIP SINGH v. SUBHASH CHANDER JAIN, reported in AIR 2000 SC 1410, wherein the Supreme Court has made applicable the principle - Quia Times Action in the action of tort.

12. Learned Advocate Mr. Thakore has also relied upon a decision of this Court in the matter of DALPATKUMAR vs. PRAHLAD SINGH, reported in AIR (1992) 1 SCC 719, wherein it is stated that in suit seeking to set aside decree, court can grant interim injunction when the suit is based on fraud or want court's jurisdiction and that in fact the court should look to the conduct of the party, probable injuries to either party and whether plaintiff could be adequately compensated if injunction is refused.

13. Learned Counsel Mr. Thakore has further relied upon a passage from the KERR ON INJUNCTIONS, 6th Edn, 1999, which states the law on `threatened injury' which has been relied upon by the Supreme Court in the matter of KULDIP SINGH vs. SUBHASH CHANDER JAIN (supra) which reads as under :

" The Court will not in general interfere until an actual nuisance has been committed; but it may, by virtue of its jurisdiction to restrain acts which, when completed, will result in a ground of action, interfere before any actual nuisance has been committed, where it is satisfied that the act complained of will

> inevitably result in a nuisance. The plaintiff, however, must show a strong case of probability that the apprehended mischief will in fact arise in order to induce the Court to interfere. If there is no reason for supposing that there is any danger of mischief of a serious character being done before the interference of the Court can be invoked, an injunction will not be granted."

14. On these grounds, it is urged that prima facie case of the plaintiff is the construction scheme which is already floated by respondent No.4, which is likely to cause prejudice to the important term of condition as aforesaid of the lease deed, that tilts the balance of convenience in favour of the plaintiff and if the construction starts, then, it would be impossible to get an injunction against each of the occupants of residential quarters for the breach of the terms of conditions to the lease deed and therefore if construction is not stopped, irreparable damage is likely to be caused to the plaintiff and, hence also, the balance of convenience is undoubtedly tilted in favour of the plaintiff - appellant. Learned Counsel Mr. Thakore further urged that the learned trial judge grossly erred in negativing the case of the plaintiff and not granting interim relief as prayed for. Therefore, it was urged that the Appeal be allowed.

15. On the other hand, learned Counsel Mr. N.D. Nanavati for the respondent No.4 has urged that the history of the litigation at this juncture is required to be looked into. It is urged that the concerned lease deed was executed between the plaintiff and respondent No.3 on 24.1.1961. Respondent No.3 vide one agreement, agreed to transfer the rights on 26.10.1993 to a third party. Thereafter, facts go to show that the Income Tax Department proceedings were started u/s 269 UD and on 29.7.1994 the order of purchase of the land by the Income Tax Department was made. Somewhere in October 1999, a public notice for the auction of such property was also published by the Income Tax Department and respondent No.4 in said auction being the highest bidder of Rs. 85 lacs purchased the property in question and the formal document is yet to be executed. The suit came to be filed on 18.9.2000. Mr. Nanavati, learned Counsel for respondent No.4 wanted to convey that in response to the advertisement of the Income Tax Department, the plaintiff has not taken any objection or made it public that the lease deed contains certain terms, by which the lessee and his assignees were bound. In these circumstances,

according to Mr. Nanavati, there was no privity of contract between lessee and the present purchaser of the land i.e. respondent No.4 and he is purchaser without notice of the term emphasised by the appellant about not cooking/or bringing of non-vegetarian food on the suit land. It was urged by learned Advocate Mr. Nanavati that the suit itself is barred by law, there is no question of maintainability of the suit, but the suit is hit by S. 293 of the Income Tax Act and the purchase was made by respondent No.4 in pursuance of the proceedings taken by the Income Tax Department u/S. 269. According to Mr. Nanavati, the suit is barred against all the defendants because the cause of action is conjoint and in the relief claimed in the suit, the possession of the suit land is prayed for against all the defendants and, therefore, the suit is barred against all the defendants. Learned Advocate Mr. Nanavati also urged that O.7 R. 11(d) of the CPC mandatorily provides that the court shall reject the plaint if the suit is barred by any law. The court must not wait for any party to apply to the court for rejection of the plaint, but court is obliged to pass an order u/O. 7 R. 11(d) of the CPC and, therefore, since the suit is barred, there is no prima facie case in favour of the plaintiff appellant. The suit is other wise hopelessly delayed by latches and according to Mr. Nanavati because even after the auction, suit could be filed after one year. Alternatively, it was also urged that suit is premature at this stage. Nobody has committed the breach of the terms fixed in the lease deed. It was also urged that other wise also the covenant mentioned in the lease deed not to bring non-vegetarian food on the suit land is hit by S. 23 of the Contract Act being opposed by the public policy because no citizen can be deprived of their eating habits. Therefore, the said covenant itself is void. It was also urged that even then the trial court has taken care in passing the order to the extent that respondent No.4 herein is restrained from constructing any structures without obtaining approval from relevant authorities and before inducting any third person on the suit property. Liberty is also reserved to respondent No.4 to apply to the trial court in case of difficulty. Therefore, learned Advocate Mr. Nanavati urged to dismiss the appeal.

16. None appears on behalf of Respondent No.3. Learned Advocate Mr. B.B. Nayak appears on behalf of Income Tax Department.

17. Having considered the rival contentions, the basic issue which would be required at this stage to be

decided is whether respondent No.4 herein, who is assignee of original lessee by auction purchase, can be restrained from constructing buildings on the suit land. Now, lease is a contract between the parties creating interest in the property. Therefore, certain statutory rights are available to the lessor as well as lessee and certain statutory liabilities are to be performed by the lessor as well as lessee. The concerned lease deed vide Condition No.2 permits lessee to construct any kind of buildings, residential quarters, godowns, etc. and lessee is also empowered to use the land as he chooses. This is the obligation of lessor under Sec.108(c) of the Transfer of Property Act to let the lessee enjoy the property leased. Now, this is also the covenant runs with the land and bound to be performed by the lessor because the protection to lessee and assignee is given by statutory provisions of Ss. 108 and 109 of the Transfer of Property Act, to enjoy the property leased. When the property is leased with these terms, undoubtedly, lessee or his assignee cannot be restrained by lessor for constructing any kind of superstructure, which may be erected by the lessee or his assignee. Temporary injunction to restrain lessee who has this covenant in his favour for erecting a structure would be an injunction against a statutory provision because vide S. 108 of the Transfer of Property Act, it is the duty of the lessor to allow the lessee to enjoy the property leased and assignee of the lessee also is protected by S. 109 of the Transfer of Property Act. The Covenant which runs with the land is an exception to general rule that all covenants are personal. Covenant is said to run with the land when either of the liabilities to perform it or the right to take advantage of it passes to the assignee of that land. Under the Transfer of Property Act, for example, the covenants of which the benefit runs with the land at law are covenants for title implied in sales under S. 55(2), the covenant implied in mortgages under S. 65, and in respect of leases, the covenant for quiet enjoyment implied in S. 108(c) of the Act. Therefore, a covenant permitting the lessee to construct on the land leased as lessee, itself is covenant running with land and enjoyment of which is implied u/S. 108(c) of the Transfer of Property Act. Restraining lessee or his assignee from constructing buildings of his choice would amount to breach or disturbance of the enjoyment of the property leased which is impliedly guaranteed by S. 108(c) of the Transfer of Property Act. No injunction by any Court can be issued in this respect, which is restraining the lessee from constructing the buildings on the suit land. The plaintiff - appellant herein has prayed for the injunction to restrain defendant No.4 i.e.

respondent No.4 herein from doing any further activity of construction of any nature on the suit land and from transferring the suit land to anybody in any manner whatsoever or create charge over the suit property or to make any activity on the suit property which will diminish the value of the same. In my opinion, the trial court was justified in refusing this temporary injunction to the plaintiff who is lessor and was entered into a covenant with the lessee which runs with the land to construct structures on the suit land, enjoyment of which is guaranteed by statutory provision of Transfer of Property Act S. 108(c). Granting of such injunction would amount to override the effect of the provisions contained in S. 108(c) of the Transfer of Property Act. Therefore, in this respect, the arguments advanced on behalf of the Appellant Mr. Thakore for the said reasons, cannot be accepted.

18. The second phase of the argument of Mr. Thakore is based on a covenant in the lease deed that lessee is forbidden to use the land or the buildings thereon in a manner, not to hurt the feelings of Hindu Religion because in remaining land of the suit land, there is a temple of God Hanumanji. A condition is also put in the lease deed that the breach of this condition will result in forfeiture of the lease and it is further clarified that hurting of feeling of Hindu Community means, the construction standing on the suit land or on the land is to be used for non-vegetarian food. This is condition No.10 in the lease deed. It was urged that by applying principle of "Quia timet action", since breach of negative covenant is to be protected in pursuance of S.40 of the Transfer of Property Act, construction is required to be restrained. Learned Advocate Mr.Thakore based his argument upon S.40 of the Transfer of Property Act. Section 40 of the said Act is as under :

> 40. Burden of obligation imposing restriction to use of land-- Where, for more beneficial enjoyment of his own immovable property, a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property, or
>
> Or of obligation annexed to ownership but not amounting to interest or easement - Where a third person is entitled to the benefit of an obligation arising out of contract, and annexed to the ownership of immovable property, but not amounting to an interest therein or easement

thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby, but not against a transferee for consideration and without notice of the right or obligation, nor against such property in his lands.

19. Learned Counsel Mr. Thakore urged that for the beneficial enjoyment of remaining land, wherein temple of God Hanumanji is situated, a negative covenant is moulded in the lease deed and enforcement of the same by a decree of injunction and by a temporary injunction is the entitlement of the plaintiff. With reference to principle "Quia timet action" as urged by Mr. Thakore, now, we shall examine S.40 of the Transfer of Property Act, as mentioned above and whether the same will have any application in this case and in the facts as narrated above. Now, examining S.40 of the Act, it clearly lays down that a third person has, independently of any interest in the immovable property of another or of any easement thereon, a right to restrain the enjoyment in a particular manner of the latter property. We are first examining the first part of S. 40 of the Transfer of Property Act, which says that third person for a beneficial enjoyment of his immovable property has right to restrain the enjoyment in a particular manner of immovable property of another. But this right does not amount to interest in the immovable property or any easement thereon. On bare reading of the Section, it is clear that S. 40 of the Transfer of Property Act will have no application in the following cases :

(i) Covenants creating an interest in immovable property.

(ii) Easement thereupon.

(iii) The affirmative covenants run with the land

(iv) Covenants merely personal i.e. to say that not annexed to the ownership of immovable property.

The object of S.40 is to protect the covenants which are universally regarded as necessary for the improvement or beneficial enjoyment of one's property.

20. This is so because when the `right' or `obligation' amount to interest in immovable property or any easement thereon or amounts to the covenant running

with the land, such right or obligation or covenant may be enforced against all transferees irrespective of the question of notice, but at the same time, the covenants which are merely personal, cannot be enforced against transferee even with notice. Therefore, we will have to examine whether the Condition No.10 is a negative covenant as envisaged u/S. 40 or merely a personal covenant. Along with this "third person" as envisaged by S. 40 will have to be also examined. Mulla in the "Transfer of Property Act in 9th Edn. at page 274, illustrates the following example :

> "The `third person' spoken of in the first paragraph is either the original covenantee or his transferee. For instance, if A owns two properties X and Y, and sells X to B, he may imposed a restriction on B that he shall, for the more beneficial enjoyment of Y, keep open a portion of X adjoining Y and not build on it. The `third person' may be A who has no longer any interest in X or any easement thereon, or he may be a purchaser of Y from A whom we shall call C., If B sells X to D, and D has notice of the covenant and D threatens to build on the whole of X, A or C may restrain D from doing so.

21. Keeping in mind this example, if we keep the present plaintiff in the place of A as above, then, it is clear that third party must not have any interest in a property of latter. In this case the present plaintiff appellant cannot be said to have no interest in the suit property but he is lessor of the property and on the breach of the conditions or on forfeiture of the lease, there will be reversion of land. As a lessor, the plaintiff has rights over the suit property amounting to interest in the same and, therefore, the phrase used in S.40 - first paragraph, " independently of any interest in the immovable property of another" will have no application to the present case. In the instance of a sale as has been quoted above, any negative covenants running with the land can be enforced against purchaser or assignee because seller will not have any interest in the property which he has sold. This rule therefore has no application when third party retains interest in the property of another. This is so because the breach of such covenant will ensue in forfeiture or reversion of the property to the lessor. It is settled principle of even English Law that the negative covenant as envisaged u/S. 40 of the Transfer of Property Act is a covenant which cannot be remedied except decree of injunction and damages. For instance, if an absolute sale is made and

for the enjoyment of property, the purchaser has entered into a negative covenant that the property will not be used in particular manner then in that case of a breach, for the seller there will be no remedy except the decree of injunction against the purchaser. In cases of lease, lessor has right to re-enter on the demised premises in case of such breach and, therefore, the lessees of the land are exception to this rule because the same will not be covered under the phrase used in S.40 i.e. "independently of any interest in the immovable property of other."

22. Before we examine whether the covenant is merely a personal or not, we shall examine the Second Part of S. 40 of the Transfer of Property Act. The Second Part of S. 40 of the said Act undoubtedly makes it clear that third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of the immovable property but not amounting to interest therein. The illustration which is given in Sec. 40 in respect of this as under :

" A contracts to sell Sultanpur to B. While the contract is still in force he sells Sultanpur to C, who has, notice of the contract. B may enforce the contract against C to the same extend as against A. "

23. From the above it is clear that to obtain benefit as third person, obligation must be annexed to ownership of the immovable property. The expression "benefit of an obligation arising out of contract and annexed to the ownership of immovable property" cannot be understood to mean "creating any interest or charge in the land" but simply "relating to ownership" or "by virtue of the right of ownership". To be more clear, the obligation of the promisor is annexed to the ownership of the land, for it is in the capacity as owner as he undertakes the obligation and the obligation concerns the land for it is an obligation for the land to offer covenant to promisee. For example, in an agreement to sell, wherein the obligation arises in respect or annexed to the land but it does not create any right in the land. With these proposition, if we examine Condition No.10 above, it clearly speaks about not hurting of the feeling of the Hindu community. It forbids the acts in terms which would hurt the feeling of Hindu community as in the remaining land there is temple of God Hanumanji. Therefore, if it is the obligation, this obligation is not annexed to the immoveable property. It is not in respect of the use of the land but forbidding the lessee

personally to abstain from doing certain act which would hurt the feeling of the community. For this simple reason this Condition No.10 cannot be benefitted by Second Para of S. 40 of the Transfer of Property Act and, therefore, also S. 40 of the Said Act shall have no application whatsoever to Condition No.10.

23. Again, as examined above, there is a difference in negative covenant and mere personal agreement. Negative covenants which are referred to in S. 40 of Transfer of Property Act are annexed to the land in question or are the covenants, independently of the interest in immovable property restricts the enjoyment of the property of others. While entering into transaction of property, the parties may agree to some personal obligations and that may be the personal contracts. Such personal contracts are never envisaged by S. 40.

24. Condition No.10, obliges lessee not to do certain acts and that is not in my humble opinion annexed to the land or covered by first para of the Sec.40 of the Transfer of Property Act and, therefore, the Condition No.10 is merely the personal contract because the same is not touching or concerning the land by which is meant that the covenant must be imposed for the benefit or to enhance the value of the land retained by the purchaser or part of it. Such covenants only when they are in negative form can be enforced against covenantee and hence this being merely a personal contract between lessor and lessee cannot bind the assignee either of the lessee or of lessor. However, restricting some acts which would other wise hurt the feeling of some community would not amount to beneficial enjoyment of the owners other property as envisaged by S. 40 of the Transfer of Property Act.

25. For the above reasons, this Court is not able to accept the argument on behalf of the appellant that u/s. 40 of the Transfer of Property Act to enforce a negative covenant of Condition No.10 in the lease deed, as per the principle of quia timet action by way of a temporary injunction, construction is required to be restricted or restrained and hence both the authorities cited on behalf of the appellant i.e. AIR 2000 SC 1410 and AIR (1992) 1 SCC 719 will have no application in the present case.

26. Very important aspect of the matter is for the breach of condition, the lessor has right to forfeit the lease and re-enter. In these circumstances, in my opinion, when breach of Condition No.10 results in reversion of land to lessor, remedy for the temporary or

permanent injunction would not be available to the plaintiff. Even, in the Halsbury's Laws of England, Para 906, as cited by Learned Advocate Mr. Thakore, it is abundantly clear that in order that a reversioner may obtain an injunction to restrain the breach of restrictive covenants affecting the estate, he must bring his case within the legal principles applicable to damages and show that damage will be done to the reversion. In foot note of Vol.24, para 906 of Halsbury's Law of England, Fourth Edition, a case of PARKER vs. WHYTE (1863) 32 LJ Ch 520 denotes that "the issue of a writ to recover possession may operate to determine the lease, and so preclude the landlord from claiming an injunction on the basis that the covenant still subsisting". Here in the present case also a decree of possession against all the defendants is prayed for vide relief 12(B) of the plaint. Therefore, the plaintiff appellant must prima facie show that the covenant is a negative covenant as envisaged by S. 40 of the Transfer of Property Act for which there is no other remedy except the decree of injunction. This is not the case herein and, therefore, there is no prima facie case in favour of the plaintiff.

27. The personal contracts cannot bind the transferee without notice even though, it was urged on behalf of the appellant that the deed of lease is registered and registration must be considered to be notice to the public and the present respondent No.4 cannot be heard to say that he is the bona fide purchaser without notice. As it appears, prima facie as discussed above that firstly the Condition No.10 is a personal contract between the lessor and the lessee. Further, registration of a document is a notice of transaction but it cannot be said that the same is a notice of personal contracts and agreement entered into between the parties by the same deed.

28. So far as the contention of the respondent No.4 regarding rejection of plaint U/O. 7 R. 11 of the Civil Procedure Code is concerned, the Trial Court may look into the matter and come to the proper conclusion whether the suit is barred against all the defendants or it is barred against some of the defendants. This Court does not express any opinion thereon at this interim juncture.

29. In this view of the matter, I do not see any reason to interfere with the order passed by the learned Trial Judge in rejecting the notice of motion of the plaintiff. However, it is made amply clear that the observations made herein are at preliminary stage and the

learned Trial Judge shall decide the suit without being influenced by the observations made in this order and may come to a different conclusion on law as well as on facts.

30. For aforesaid reasons Appeal must fail and is dismissed accordingly. However, the interim relief granted by this Court in favour of the Appellant on 13th March, 2001 and is in force today shall be extended for four weeks from today in case the appellant intends to approach the Apex Court. No order as to costs.

(J.R. Vora, J.)

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